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The "Pour-Over" Trust and the Wills Statutes; Uneasy Bedfellows

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One of the most highly touted devices of modern estate planning is the so-called "pour-over" trust. Such a "trust" is nothing more than a provision in the will which directs the disposition of probate assets in accordance with the terms of an existing inter vivos trust. Many valid reasons exist for the predilection in favor of such use of an inter vivos trust as the focus for a unified estate plan.[1] One primary advantage lies in the flexibility which can be derived by employing a revocable, amendable inter vivos trust as a vehicle for channeling changes in a testamentary scheme without complying with all the technical formalities of a wills statute. Perhaps it is this very aspect which has created the problems encountered by the courts in their quest to determine the validity of the "pour-over" provision. Certainly the least that can be said is that jurists have had conceptual difficulties in approving such provisions within the framework of a wills statute. It is the purpose of this paper to trace these conceptual difficulties through the vagaries of decisional law and academic theories in order to suggest some comprehensive scheme for determining the permissible scope of such provisions.

Since the pour-over trust is a provision in a will, any discussion of the validity of such a trust depends upon a comprehension of the social policy enunciated by the wills statutes. The basic format of the wills statute is to require the testator to describe the subjects, objects, and conditions of his testamentary bounty by

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[1] See *e.g.*, Casner, Estate Planning, 87-107 (2d ed. 1956); McClanahan, *Bequests to an Existing Trust; Problems and Suggested Remedies*, 47 Calif. L. Rev. 267 (1959); Shattuck, *Some Practical Aspects of the Problems of the Alterable and Revocable Inter Vivos Trust in Massachusetts*, 26 B.U.L. Rev. 437 (1946); Polasky, *"Pour-Over" Wills and the Statutory Blessing*, 98 Trusts & Estates 949 (1959); Polasky, *Pour-Over Wills: Used with Inter Vivos Trusts*, 17 Sw. L.J. 410 (1963).

means of a written document executed with certain formalities. The purpose behind these requirements is to provide adequate safeguards to prevent fraud and ensure the accurate fulfillment of the testator's desires. Accordingly a pour-over provision, since it fails to identify the beneficiaries of the property, does not comply strictly with these requirements. However, there are two basic wills doctrines, developed in other contexts, which permit references to extrinsic facts or documents without violation of the wills statutes. These two doctrines are generally referred to as incorporation by reference and acts of independent significance. The former refers only to, and requires only, an extrinsic written document which is (1) in existence in fact prior to the execution of the will, (2) referred to in the will as being in existence, (3) properly identified in the will, and (4) intended to be incorporated.[2] The second doctrine permits reference to extrinsic facts having a basically non-testamentary aspect for the purpose of identifying the beneficiaries intended or the property bequeathed.[3] Both theories have been applied, with varying degrees of success, to the question of the validity of the pour-over provision.

I. INCORPORATION BY REFERENCE

Despite persistent urgings by text writers for the adoption of the doctrine of acts of independent significance as the basic theory in pour-over cases,[4] the courts have analyzed the issue of validity primarily in terms of incorporation by reference. Virtually exclusive use of this doctrine has inevitably led to some rather bizarre opinions, particularly with regard to pour-over provisions referring to revocable, amendable inter vivos trusts.

As previously stated, incorporation by reference involves the use of an extrinsic written document to identify the beneficiaries, the property, or the terms and conditions of a testamentary gift. The primary requisite for the use of this doctrine is that the document referred to be in existence when the will is executed. The doctrine has normally been applied to cover such items as

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[2] 2 Bowe-Parker: Page on Wills § 19.18 (1960).

[3] *Id.* at § 19.34; 1 Jarman, Wills 123-28 (7th ed. 1930).

[4] *E.g.*, 1 Scott, Trusts § 54.3 (2d ed. 1956); Palmer, *Testamentary Dispositions to the Trustee of an Inter Vivos Trust*, 50 Mich. L. Rev. 33 (1951); McClanahan, *supra* note 1; Shattuck, *supra* note 1.

written memoranda, undelivered deeds, letters, etc.; written documents which, though dispositive in form, have no legal validity independent of the reference to them in the will. When the reference, however, is to an inter vivos trust agreement, the fact pattern changes. Such agreements have a legal validity independent of the will and operate to govern the treatment and disposition of the assets assigned to the trustee under the agreement. Because of this difference in pattern, there has been an occasional confusion in court opinions between the document, which is the subject of the incorporation, and the trust itself, which is the entity governed by the terms of that written document. In one recent opinion,[5] for example, the Massachusetts court held that an amendment to a trust could not be validly incorporated by reference by means of a codicil executed subsequent to the reduction to writing of the amendment. The terms of the inter vivos trust required all amendments to be accepted by the trustee before they became effective and the trustee had not formally accepted the amendment until a few days after the execution of the codicil. Therefore, the court reasoned that the amendment was not in existence for purposes of incorporation by reference at the time of the execution of the codicil. This would seem to be a clear misapplication of the existence requirement of incorporation by reference. A written document entitled "amendment" was in existence at the time of execution of the codicil. The fact that it had not yet become effective in regard to the assets of the inter vivos trust is actually immaterial since the doctrine does not require such independent legal effect. In a similar case[6] the Supreme Court of Arkansas correctly analyzed the existence requirement vis-à-vis an inter vivos trust by approving a provision referring to a trust indenture which was not executed until after the execution of the will. As the court succinctly stated, "The requirement for incorporation by reference is only that the extrinsic document be in existence, not signed, and this fact is established by undisputed proof."[7]

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[5] Second Bank-State Street Trust Co. v. Pinion, 341 Mass. 366, 170 N.E.2d 350 (1960); see also Clark v. Citizens Nat'l Bank of Collingwood, 38 N.J. Super. 69, 118 A.2d 108 (Ch. Div. 1955).

[6] Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950); see also *In re* Brandenburg's Estate, 13 Wis. 2d 217, 108 N.W.2d 374 (1961); 1 Scott, *op. cit. supra* note 4 (1964 Supp.), at 37-38 (referring to p. 379, n. 16).

[7] Montgomery v. Blankenship, *supra* note 6 at —; 230 S.W.2d at 54.

Existence of the written document then is the keynote to incorporation by reference. Where the document postulated is an irrevocable trust, existence in fact of the trust document prior to execution of the will clearly satisfied this requirement. However, where the trust indenture was revocable or amendable, such existence in fact of the original indenture was not always deemed sufficient. The theoretical stumbling block arose because of the courts' failure to emphasize reference as opposed to incorporation. There appeared to be a feeling that since the terms were physically incorporated into the will, the amending clause of the inter vivos trust agreement would permit changes to the will by documents which were neither in existence at the date of execution of the will nor executed in accordance with the wills statutes. Actually, with the exception of one English case,[8] this attitude never resulted in a decision adverse to the validity of a pour-over provision merely because it referred to a revocable, amendable trust.

Two American decisions[9] have been cited as authority for the proposition that incorporation by reference cannot be used to validate a pour-over to a revocable, amendable trust. Both cases, however, are distinguishable. In *Atwood v. Rhode Island Hospital Trust Co.*,[10] the court specifically stated that incorporation by reference was not at issue. The language in the will did not refer to or identify any document and therefore failed to satisfy the basic requirements for the use of the doctrine.[11] The opinions of both the majority and the dissent were directed at the issue concerning use of acts of independent significance. Unfortunately the language of the majority in referring to a written document[12] has led more than one court to a belief that the *Atwood* case was decided on the issue of incorporation by

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[8] *In re* Jones [1942] Ch. 328, 1 All E.R. 642; but compare, however, the later cases of In re Edwards' Will Trusts, [1948] Ch. 440, *modifying* [1947] 2 All E.R. 521 and *Re* Schnitz's Will Trusts, [1951] Ch. 870, [1951] 1 All E.R. 1095. See also Comment, 57 Mich. L. Rev. 81, 82-83 (1958) for discussion of these three cases.

[9] Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (1st Cir. 1921); President & Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (1940).

[10] 275 Fed. 513 (1st Cir. 1921).

[11] *Id.* at 520, 525; Comment, 39 Va. L. Rev. 817 (1953).

[12] Judge Anderson, speaking for the majority, said, "Manifestly, then, the real disposition of this residuary estate is made, not by the will, but by the shifting provisions in the trust instrument." 275 Fed. at 521.

reference.[13] In *Janowitz v. Board of Directors of the Manhattan Co.*,[14] there is indeed language tending to deny the use of the doctrine with an amendable trust. However, there were in fact both pre-execution and post-execution amendments to the agreement and the primary issue was directed toward the effect of these amendments on the validity of the pour-over provision. Suffice it to say that today it seems clear that a revocable, amendable inter vivos trust which has not been amended can be incorporated by reference by means of a pour-over provision.[15]

Once this initial barrier was eliminated, the next issue that arose concerned the amendments actually made to the trust. Could those amendments be included within the pour-over provision so as to affect the disposition of the probate assets covered by such provision? If not, would such denial necessarily invalidate the whole pour-over provision?

Two methods were soon designed to provide an affirmative answer to the first question. First, any amendment to the trust agreement which was executed prior to the execution of the will (or the last codicil thereto) could validly be incorporated by reference within the coverage of the pour-over provision.[16] Secondly, any amendment executed after the will, while not subject to inclusion under incorporation by reference, could still be given effect as to the probate assets if such amendment was executed in compliance with the formalities of the wills statute.[17] So long as such amendment was in writing, signed by the testator, witnessed and attested in accordance with the wills statute, it could be treated as a codicil. While no theoretical problem is presented by the first method, it is indeed strange to see the courts which generally struggle with the problem of whether or not a written document which is non-testamentary in form can be regarded as

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[13] *E.g.*, Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950); Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1951).

[14] 260 App. Div. 174, 21 N.Y.S.2d 232 (1940).

[15] Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950); Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1951); State *ex rel.* Citizens Nat'l Bank v. Superior Ct., 236 Ind. 135, 138 N.E.2d 900 (1956); Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); *Re* Schnitz's Will Trusts, [1951] Ch. 870, [1951] 1 All E.R. 1095.

[16] Forsythe v. Spielberger, 86 So. 2d 427 (Fla. 1956); First-Central Trust Co. v. Claflin, 73 N.E.2d 388 (Ohio C.P. 1947).

[17] Forsythe v. Spielberger, *supra* note 16; Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1951); Merrill v. Boal, 47 R.I. 274, 132 Atl. 721 (1926).

a will,[18] approve as a codicil a trust amendment which by its terms contains no *animus testandi.* The Rhode Island court, when faced with a similar situation,[19] frankly admitted the problem but said:

> A person may act *animo testandi* without knowing that he is making a will and it is immaterial what kind of instrument he thinks he is making if only he manifests a clear intent to dispose of his property after his decease and observes the statutory formalities. . . .[20]

Not only were these two methods for saving the problem accepted, but the courts were also quick to seize upon a further solution which permitted them, as a practical matter, to give effect to the amendment without regard to the issue of validity. Since the amendments were valid insofar as the inter vivos trust was concerned,[21] they could be satisfied from the corpus of the inter vivos trust. Whenever this was factually possible, the courts, while admitting that the amendments could not be included within the pour-over provision, nevertheless gave effect to the pour-over provision by ignoring the amendments.[22] As a result they were able to avoid the second question presented above.

When the amendment was neither executed in accordance with the formalities required of the wills statute, nor in existence on the date of the execution of the will, and when the terms of the amendment either specifically referred to probate assets, or necessarily affected them, the pour-over provision could not validly include such amendments.[23] If then the pour-over provision is invalid insofar as it attempts to incorporate certain amendments thereto, is the whole provision invalid? There

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[18] *E.g.,* Nobles v. Fickes, 230 Ill. 594, 82 N.E. 950 (1907); see generally Atkinson, Wills § 43, at 189, § 47 (2d ed. 1953); 1 Bowe-Parker: Page on Wills § 6.2 (1960).

[19] Merrill v. Boal, 47 R.I. 274, 132 Atl. 721 (1926).

[20] *Id.* at –, 132 Atl. at 725.

[21] Assuming the requirements of the trust agreement itself were complied with.

[22] Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934); *cf.* Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935) [where the court's decision is based on the proposition that the testator did not intend to incorporate any subsequent amendments to the trust].

[23] Forsythe v. Spielberger, 86 So. 2d 427 (Fla. 1956); Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1951); Old Colony Trust Co. v. Cleveland, *supra* note 22; Koeninger v. Toledo Trust Co., *supra* note 22.

appears to be agreement that the answer to this question must depend upon the testator's intent.[24] The difficulty is that the question does not involve a problem of interpretation, (*i.e.*, a decision as to what the testator intended by the words he used) but rather a question of construction, (*i.e.*, a determination of the testator's intent covering a situation which he did not envisage). Like all problems of construction the result always involves an element of rationalization by the court; therefore the conceptual results are anything but satisfying. Two answers have been offered. The first of these would rule the whole provision invalid. Since the testator intended the probate assets to be distributed in accordance with the terms of the trust as it existed at the time of his death, his intent cannot be given effect unless all amendments can be included. Having postulated that they could not, the whole provision must fail. This was the view adopted by Professor Scott in the first edition of his treatise on trusts.[25] Other writers,[26] however, argued that since the frequent result of such a decision is intestacy, the testator's basic intent to die testate should overcome his specific intent to include all amendments. Accordingly, they urged that the provision be given effect as to the basic instrument together with all amendments which could be validly included in accordance with the preceeding discussion. Professor Scott himself adopted this view in the second edition of his treatise.[27]

Both views have merit, but both involve purely mechanical decisions as to the testator's intent. If the desire is truly to determine the testator's intent, then an analysis must be made in accordance with the facts and circumstances surrounding the execution of the will, the codicils, the trust agreement and all amendments thereto, so as to determine his probable decision had he been aware that the trust amendments could not validly affect his probate assets. Such an analysis would require investigation as to the scope and nature of the changes effected in his

[24] Wells Fargo Bank & Union Trust Co. v. Superior Ct., 32 Cal. 2d 1, 193 P.2d 721 (1948); St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770 (Mo. 1962); *In re* York's Estate, 95 N.H. 435, 65 A.2d 282 (1949); *Re* Leonard, [1943] 1 D.L.R. 541 (1936); 1 Scott, *op. cit. supra* note 4; Palmer, *supra* note 4; Polasky, *supra* note 1.

[25] 1 Scott, Trusts § 54.3 at 299 (1st ed. 1939).

[26] *E.g.*, Palmer, *supra* note 4.

[27] 1 Scott, Trusts § 54.3 at 377 (2d ed. 1956).

general testamentary scheme by the ineffective amendments as well as an inquiry into those persons who would take by intestacy as opposed to those who would take under the terms of the trust as they existed prior to the ineffective amendments. Such an analysis is admittedly never completely satisfactory, but it appears at least to be more rational than to adopt a straight "yes or no" answer based on a theory of probable intent derived in a vacuum.[28]

The final problem with regard to the issue of validity through the use of incorporation by reference arises when the inter vivos trust referred to in the pour-over provision has been revoked by the testator prior to his death. Since incorporation by reference is concerned with a written document rather than with an operating fact or entity, it is not surprising to see that in the only appellate court decision on this issue it was held that the revocation was ineffective to affect the distribution of the probate assets.[29] Even though the inter vivos trust no longer existed as an entity, the document which governed the trust would determine the distribution of the probate assets.

II. ACTS OF INDEPENDENT SIGNIFICANCE

The genesis of acts of independent significance as a method of validating "pour-over trusts" began with the recognition of the inadequacies of incorporation by reference. Its growth, however, while scholastically phenomenal, was judicially retarded.[30] Although expressions of approval were occasionally made,[31] it was not until 1960 that the accolade of judicial legitimacy was conferred specifically by a high court.[32] This delay can be traced directly to the conceptual difficulties incurred in attempting to fit the inter vivos trust into the category of an act of independent significance.

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[28] Compare such test for example with dependent relative revocation and its dichotomy of mechanical vs. intent tests.

[29] Fifth-Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 70 N.E.2d 920 (1946); see also Marshall v. Northern Trust Co., 22 Ill. 2d 391, 176 N.E.2d 807 (1961).

[30] Two cases actually ruled against use of the doctrine: Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (1st Cir. 1921); Boal v. Metropolitan Museum of Art, 298 Fed. 894 (2d Cir. 1924).

[31] *E.g.*, Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1951); *In re* York's Estate, 95 N.H. 435, 65 A.2d 282 (1949).

[32] Second Bank-State Street Trust Co. v. Pinion, 341 Mass. 366, 170 N.E.2d 350 (1960).

The crux of the problem in any attempt to employ the doctrine of acts of independent significance lies in the issue as to the "non-testamentary aspect" of the extrinsic fact which completes the identification of the object or subject. The essence of the requirement of "non-testamentary aspect" is nothing more than a recognition of the ancient maxim that a testator cannot by his will create a power in either himself or another to dispose of his property without complying with the formalities of a wills statute. Where the extrinsic fact is subject to manipulation by the testator, or a named third person, for the primary purpose of selecting the beneficiary or property, the maxim is violated and the extrinsic fact lacks the necessary "non-testamentary aspect." Thus the issue of "non-testamentary aspect" arises when the extrinsic fact is an event or occurrence which is to take place after the will is executed. Although the extrinsic event itself will occur after the execution of the will, the "non-testamentary" aspect of the event must be decided as of the date of the execution of the will. In each case then the event must be analyzed to determine whether or not the testator, on the date of execution, would have been inclined to control the occurrence or event for testamentary purposes. The mere fact of control per se does not make the event testamentary;[33] so long as the exercise of the control has primary significance independent of the testimentary dispositions, the maxim and the doctrine, and therefore the purpose of the wills statute, is satisfied. In fact, the cases and writers all seem to presuppose that the testator's factual control over the event is immaterial;[34] only the probabilities of control are important, and they can be tested only by reference to the time of execution of the will.

With such considerations in mind then the courts have designated certain events as having that necessary independent significance. The typical examples are: hiring of employees (for gifts to "those in my employ at the time of my death");[35] entering into partnerships (for gifts to "those in partnership with me at the time of my death");[36] and renting safe deposit boxes (for

[33] Atkinson, Wills § 81 (2d ed. 1953); 2 Bowe-Parker: Page on Wills § 19.34 (1960); 1 Scott, Trusts § 54.3 (2d ed. 1956).

[34] Atkinson, Wills 395 (2d ed. 1953); Evans, *Nontestamentary Acts and Incorporation by Reference*, 16 U. Chi. L. Rev. 635 (1949).

[35] *E.g.*, Metcalf v. Sweeney, 17 R.I. 213, 21 Atl. 364 (1891).

[36] *E.g.*, Stubbs v. Sargon, 3 Myl & C. 507, 40 Eng. Rep. 1022 (1838).

gifts of "the content of my safe deposit box").[37] In each case it is possible for the testator to use the event for the purpose of designating his testamentary bounty, but because each such event is of "a business nature and has reason for its existence apart from any disposition of the property under the will,"[38] it is probable that the testator would use it primarily for such non-testamentary purposes. Accordingly, the possible use is subjected to the probable use in light of the independent aspect of the event.

Where the doctrine is applied to the "pour-over trust" situation, the extrinsic fact becomes the inter vivos trust. Accordingly, the basic conceptual difficulty lies in categorizing such a trust as primarily non-testamentary in terms of the probabilities of its use where the trust was created by the testator.[39] If the trust is both irrevocable and extant when the will is executed, there is in fact no control left in the testator; the trust is as complete and final as a past event. Such a trust raises no issue as to possible testamentary use and should therefore involve a proper application of the doctrine. No such neat solution, however, can solve the problem created by the revocable, amendable trust regardless of whether it is amended or not.[40] The control retained by the settlor-testator is absolute and his exercise of that control is predicated solely on his basic donative desires. Such donative desires are also primarily testamentary in the broad sense; the major beneficial interests in the trust are scheduled to take effect in possession after the settlor's death. Accordingly, any idea of independence seems somewhat amorphous. There is very little check on the testator's use of the extrinsic act solely for the purpose of regulating his testamentary bounty free from the formal restrictions of the wills statute. The settlor can change

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[37] *E.g.*, Gaff v. Cornwallis, 219 Mass. 226, 106 N.E. 860 (1914).

[38] Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513, 528 (1st Cir. 1921) (dissenting opinion of Judge Bingham).

[39] This paper will not be concerned with the relatively rare case of a pour-over to a trust created by another. Although much of the discussion of the settlor-testator situation is applicable to such a case, there are sufficient variations and variables to require separate treatment. See generally 1 Scott, Trusts § 54.4 (2d ed. 1956).

[40] Since we are concerned with the probabilities of use of the extrinsic fact under the doctrine rather than with the actual use, it is immaterial whether the trust is in fact amended. If, however, the extrinsic fact (*i.e.*, the trust fund) is not in existence (*i.e.*, is revoked) at the testator's death, the bequest fails because there is no fact to complete the necessary identification. Thus even though the time of testing for probability of use is the date of execution of the will, once the fact is regarded as "non-testamentary" it is referred to as of the testator's death for purposes of completing the bequest.

the identity of the recipient or object of a testamentary gift by unilaterally amending his inter vivos trust. To classify the settlor's probable use of his control over such a trust as independent or non-testamentary would appear to be somewhat facetious. In fact, it is difficult indeed to envisage any change in the terms of such a trust except as a reflection of the settlor-testator's altered attitudes regarding the devolution of his property on his death. The probability of use of the extrinsic fact to make changes in the testamentary plan is of an extremely high order. Under such an analysis of acts of independent significance, the doctrine should be considered inappropriate and inapplicable to the revocable, amendable trust.[41]

Despite the above many scholars and judges have argued and apparently still argue that the doctrine not only can be employed but appropriately should be employed to validate pour-over provisions to revocable, amendable trusts.[42] The basic approaches appear to be; 1) the creation of such a trust is itself an act of independent significance, or, 2) so long as the value of the corpus of such a trust is more than purely nominal, any amendments would have the necessary independence in connection with their affect on the assets of the trust. There can be little doubt today but that such a trust has sufficient independent legal existence to escape the rigors of the wills statutes with regard to the assets conveyed to the trustee under the agreement.[43] In fact, under the

[41] It is interesting to note that acts of independent significance has apparently never been used in England in connection with a pour-over. (See Evans, *supra* note 34 and *cf. Re* Schnitz's Will Trusts, [1951] 1 Ch. 870 [1951] 1 All. E. R. 1095; *In re* Whitburn, [1923] 1 Ch. 332.) It is probable that the reason lies in the greater care used by English lawyers in following the requirements of incorporation by reference and in the acceptance by the English courts of the "secret trust" (Blackwell v. Blackwell, [1929] A.C. 318, 67 A.L.R. 336). One of the basic requirements for the validity of a "secret trust," however, is that the trustee named in the will must have been notified of the terms and conditions of the trust *prior* to the execution of the will. [2 Jarman, Wills 884 (7th ed. 1930).] Accordingly while a revocable, amendable trust agreement could govern such a "secret trust," no later amendments could affect the probate assets without re-execution of the will (or execution of a codicil) *after* notification of the terms of the amendment to the trustee. (*Cf. In re* Colin Cooper, [1939] Ch. 811, *affirming* [1939] Ch. 580.)

[42] 1 Scott, Trusts § 54.3 (2d ed. 1956); Restatement, Trusts 2d § 54; McClanahan, *supra* note 1; Palmer, *supra* note 4; Note, Mich. L. Rev. 1276 (1961), *but cf.* Lauritzen, *Can a Revocable Trust be Incorporated by Reference,* 45 Ill. L. Rev. 583 (1950); Shattuck, *supra* note 1; Evans, *supra* note 34.

[43] National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942); Central Trust Co. v. Watt, 139 Ohio St. 50, 38 N.E.2d 185 (1941); see generally 1 Scott, Trusts § 57.2 (2d ed. 1956); Annot., 34 A.L.R.2d 1270 (1954).

prevailing doctrines the settlor can retain all the incidences of ownership in the trust assets except title and the right to immediate possession.[44] So long as the *form* of the transaction between the transferor and transferee is that of a trust agreement, the transaction is an inter vivos one and the assets so transferred are removed from the aegis of the wills statute.[45]

The term "non-testamentary" as used in the doctrine of acts of independent significance, however, cannot be equated with "non-testamentary" meaning "inter vivos." In its latter connotation the term simply refers to the time of transfer of title to property while as used in the doctrine it embodies an issue as to the probabilities of use of an extrinsic fact to determine the object or subject of an admittedly "testamentary" gift. Thus while it is possible to argue effectively that the control retained by the trustor of such a trust does not adversely affect the fact that title and possession to the assets thereof have been transferred inter vivos, it by no means follows ipso facto that the exercise of such control will probably be independent of the trustor's testamentary plan. On the contrary, such a trust admittedly offers a substitute for testamentary disposition.[46] Accordingly, the mere creation of such a trust cannot be regarded as having "non-testamentary" significance within the meaning of the doctrine of acts of independent significance.

Professor Scott, the leading exponent of the use of the doctrine in these cases, argues that the test of independence lies not in the control retained by the testator but in the significance of the extrinsic fact apart from the disposition of the probate assets.[47] Accordingly, he admits that a trust purely nominal in value would lack such significance.[48] In other words, if the value of the trust estate is too small, the testator-settlor is most likely to

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[44] Atlantic Nat'l Bank v. St. Louis Union Trust Co., 357 Mo. 770, 211 S.W.2d 2 (1948); and even these can be retained where the so-called "Totten Trust" is permitted. Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904); *contra,* Estate of Hoffman, 195 N.E.2d 106 (Ohio 1963).

[45] Unless conflict arises between such formalism and public policy considerations like the widow's rights—*e.g.,* Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); *In re* Husted's Est., 403 Pa. 485, 169 A.2d 57 (1961); see generally 1 Scott, Trusts § 57.5 (2d ed. 1956).

[46] Prof. Atkinson categorizes such trusts as "Will Substitutes," Atkinson, Wills § 42 (2d ed. 1953); *cf.* 1 Scott, Trusts §§ 57.1-57.3 (2d ed. 1956).

[47] 1 Scott, Trusts § 54.3, at 377 (2d ed. 1956).

[48] *Id.* at 379-80; Scott, *Trusts and the Statute of Wills,* 43 Harv. L. Rev. 521 (1930).

exercise his control over the trust in order to change the devolution of the pour-over assets rather than for the independent purpose of determining the ultimate disposition of the trust assets. Therefore it is submitted that Professor Scott's "significance" test is essentially identical with the probabilities of use test suggested above. Unlike this writer, however, Professor Scott would consider a substantial trust as lacking that probability of improper use because any exercise of control over such a trust involves a change in the disposition of the substantial assets contained in the trust itself.

This dichotomy of substantial vs. nominal is subject to two objections. In the first instance is the practical problem offered by the use of such terms. Substantial or nominal in comparison to what? Do the terms refer to some absolute or do they involve a comparison of the trust assets vis-à-vis the pour-over assets? If the former, then what value must the trust have to qualify? If the latter, then what is the proportional relationship necessary to sustain a finding of substantiality for the inter vivos trust? The Maine court in *Canal Nat'l Bank v. Chapman*,[49] in categorizing the inter vivos trust as "substantial," made careful reference to the fact that the inter vivos trust had a value of $120,000 as compared with a probate estate of $93,000. Does this signify that the trust estate must be larger than the probate estate? Furthermore, is the independence of the extrinsic fact (the trust) now to be determined as of the date of death of the testator-settlor? Even more important than the practical problems raised by this comparison test is the theoretical one previously postulated concerning the basic drives of the testator-settlor in altering the dispositive provisions of the trust. Regardless of the size of such a trust the settlor will regard it as primarily an instrument for effectuating his testamentary plans. There is no justification for believing that in amending the trust the settlor is not in fact thinking in terms of the disposition of his property on his death; his exercise of control then is directly linked to his testamentary desires.

Regrettably, two courts have officially adopted and applied the doctrine to revocable, amendable trusts. In *Second Bank-*

[49] 157 Me. 309, 171 A.2d 919 (1961).

State Street Trust Co. v. Pinion,[50] the Massachusetts court, after unnecessarily garbling incorporation by reference,[51] upheld the pour-over device under acts of independent significance for five reasons: 1) Professor Scott and the Restatement, Trusts 2nd approved it, 2) the creation of the trust was itself a fact of independent significance, 3) the pour-over device was important to modern estate planning, 4) 18 states had enacted statutes authorizing some form of pour-over, and 5) he formalities of execution of the trust agreement and the solemnity surrounding the transfer satisfy the basic purposes of the wills statute. The Maine court in the *Chapman* case[52] reached the same conclusion but on the basis that the trust had been an operating existing entity of a substantial size[53] and such active "independent" life satisfied the criteria for use of the doctrine.

This writer's objection to the use of this doctrine in such cases has developed progressively from a mild irritation to a severe itch because of two essentially pragmatic factors. The first of these lies in the ease with which amendments to such trusts can be made. Ordinarily no witnesses are required to such amendments. The trust agreement together with its amendments seldom sees the light of public scrutiny. In fact since the doctrine has reference to trust entity rather than the trust agreement, the trust could as easily be an oral one, amendable by telephone call. Under such conditions the stage is set for fraud, undue influence, mental incompetency and even forgery. More importantly, however, the ease of amending, lacking as it does the solemnity attendant on all will or codicil executions, frequently destroys the need for contemplation before initiating changes in testamentary plans. In short, the use of the doctrine opens the door to those very ills which the wills statutes sought to contain.

The second objection springs from the confusion which advocacy of the doctrine has raised in the area of administering the pour-over assets. Both incorporation by reference and acts of independent significance are concerned solely with the issue of the validity of the pour-over provision. They were not designed

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[50] 341 Mass. 366, 170 N.E.2d 350 (1960).
[51] See discussions *supra* p. 733 and *infra* p. 746.
[52] Canal Nat'l Bank v. Chapman, 157 Me. 309, 171 A.2d 919 (1961).
[53] The trust had existed and operated for over ten years according to the data supplied by the court.

to govern the issue as to whether the testator intended to establish a separate testamentary trust or merely add probate assets to the corpus of the inter vivos trust. The very term "pour-over" is indicative of the testator's obvious desires on this point; he expects the assets to be added to the inter vivos trust and administered as a part thereof. Despite this, however, many courts, influenced by the arguments in favor of acts of independent significance as opposed to incorporation by reference, took the position that the former alone permitted the assets to be added to the corpus of the existing trust;[54] incorporation by reference was regarded as requiring the creation of a separate testamentary trust.[55] It is submitted that while there is undoubtedly a certain logic in so distinguishing the application of the two doctrines, they were never intended for such a purpose, and to insist upon such purpose will frequently violate the testator's intention.

The primary confusion occurs in relation to the doctrine of incorporation by reference as it is applied to the pour-over provision. This doctrine is no more than a label given to the process by which courts permit the identification of beneficiaries and/or bequests by reference to an extrinsic document, in this case the trust indenture. The testator's intent to identify the beneficiaries by referring to the indenture, however, is not necessarily equated with any intent to physically incorporate the words of the indenture into the body of the will. Reference, rather than incorporation, is the keynote of this doctrine.[56] It is in this respect that incorporation by reference differs from integration, where every written paper must be presented for probate as a part of the

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[54] Wells Fargo Bank & Union Trust Co. v. Superior Ct., 32 Cal. 2d 1, 193 P.2d 721 (1948); Estate of Willey, 128 Cal. 1, 60 Pac. 471 (1900); *In re* York's Estate, 95 N.H. 435, 65 A.2d 282 (1949); 2 Bowe-Parker: Page on Wills § 19.28 at 109-10 (1960).

[55] Wells Fargo Bank & Union Trust Co. v. Superior Ct., *supra* note 54; St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770 (Mo. 1962); 2 Bowe-Parker: Page on Wills § 19.28 (1960); *but cf.* Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); Linney v. The Cleveland Trust Co., 30 Ohio App. 345, 165 N.E. 101 (1928); *In re* Playfair, [1951] Ch. 4; *contra, Re* Leonard, [1943] 1 D.L.R. 541 (1936); State *ex rel.* Citizens Nat'l Bank v. Superior Ct., 236 Ind. 135, 138 N.E.2d 900 (1956); 1 Scott, Trusts § 54.3 at 382-84 (2d ed. 1956).

[56] *Cf.* Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); *Re* Leonard, [1943] 1 D.L.R. 541 (1936); *In re* Edwards' Will Trusts [1948] Ch. 440, *modifying* [1947] 2 All E.R. 521; *Re* Schnitz's Will Trusts [1951] Ch. 870, [1951] 1 All E.R. 1095.

whole will.[57] Failure to recognize this vital distinction between the two doctrines has led many courts astray.

Once mired in the error of believing that incorporation by reference automatically involves physical integration of the extrinsic trust document into the will, the courts have had difficulty in extricating themselves from the natural conclusion that the use of incorporation by reference to validate a pour-over provision leads ipso facto to the creation of a separate testamentary trust. So pervasive has this error become that one court recently implied that incorporation by reference would require the physical integration not only of the terms of the extrinsic inter vivos agreement but of any funds governed by that agreement as well.[58] This misconception has increased the pressure on the courts to apply the doctrine of acts of independent significance to the question of validity in order to effectuate the testator's intent to add the probate funds to the inter vivos trust.

Not only have issues of administration been decided by the use of doctrines governing validity but issues of validity have similarly been affected by expressions of intent by the testator regarding administration. Thus the Massachusetts court in the *Pinion* case[59] ruled out the use of the doctrine of incorporation by reference on the issue of validity because of the testator's express direction in the will that the funds governed by the pour-over provision were to be added to the inter vivos trust and administered as a part of its corpus. The court held that such an expressed desire destroyed any intent to incorporate the trust agreement. The Maine court in the *Chapman* case[60] arrived at the same conclusion in the course of its opinion. The intent to incorporate under incorporation by reference is merely an intent to refer to the extrinsic document for identification of beneficiaries and/or the subject matter of a gift and therefore has independent bearing from the intent as to administration. Therefore it was error for either court to equate these two intents.

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[57] So under incorporation by reference it is not necessary to admit such documents to probate—2 Bowe-Parker: Page on Wills § 19.32 at 117 (1960); 1 Jarman, Wills p. 126-28 (7th ed. 1930).

[58] *In re* Steck's Will, 275 Wis. 290, 81 N.W.2d 729 (1957).

[59] Second Bank-State Street Trust Co. v. Pinion, 341 Mass. 366, 170 N.E.2d 350 (1960).

[60] Canal Nat'l Bank v. Chapman, 157 Me. 309, 171 A.2d 919 (1961).

CONCLUSION

In view of the inadequacies of incorporation by reference and the dangers, both theoretical and practical, in the use of acts of independent significance, is the pour-over provision to be abandoned? The answer is an emphatic no! It is a most useful device and offers many advantages besides that of evading the wills statutes. As such it should be retained, but its use should not require being straitjacketed by pre-existing doctrines which are not truly applicable; nor should those doctrines in turn be stretched and strained to cover the pour-over to the revocable, amendable trust. For this reason some 31 states have enacted some form of legislation specifically covering the pour-over to such a trust as a matter of statutory fiat.[61] While the wisdom of such legislation is debatable, its use precludes the necessity of reference of either of the two doctrines discussed above.

New York and New Jersey, however, have perhaps best achieved by judicial means the proper balance between the utility of the pour-over device and the danger of its misuse. Both jurisdictions had decided that incorporation by reference could not properly be used for any purpose within the context of the wills statute.[62] Accordingly, when the first pour-over cases reached the courts the contestants argued that the pour-over provision was an attempted incorporation by reference and therefore void. Justice Cardozo,[63] in his usual inimitable fashion, replied that the rule against incorporation should not be carried to its "drily logical extreme"[64] and accordingly upheld the pour-over on the basis that the opportunities for fraud and chicanery were totally absent in the case of an irrevocable pre-existing written trust. Since the purpose of the wills statute therefore was not violated, the pour-over clause was valid. It is submitted that Cardozo was neither approving incorporation by reference nor adopting acts of independent significance, but rather stating a general philosophy of examining each case to determine its result

[61] According to the 1963 tabulation made by Leon Schaeffler, Esq. for the Editorial and Research Committee of the American College of Probate Council published in 102 Trusts & Estates 265 (1963).

[62] Murray v. Lewis, 94 N.J. Eq. 681, 121 Atl. 525 (1923); Booth v. Baptist Church of Christ, 126 N.Y. 215, 28 N.E. 238 (891); *but cf.* 2 Bowe-Parker: Page on Wills §§ 19.21 and 19.22 (1960).

[63] In his opinion in Matter of Rausch, 258 N.Y. 327, 179 N.E. 755 (1932).

[64] *Id.* at —, 179 N.E. at 756.

vis-à-vis the purpose of the wills statute.[65] On such an *ad hoc* basis can *Matter of Fowles*[66] and *Matter of Ivie*[67] be justified. On such basis can *President and Directors of Manhattan Bank v. Janowitz*[68] be reconciled. In each case the court examined the facts surrounding the use of the extrinsic trust agreement as it affected the probate assets. The examination was made as of the testator's date of death in order to decide whether there was in fact that opportunity for fraud and chicanery which led initially to the refusal to recognize incorporation by reference. While the pattern is not as clear in New Jersey it is submitted that its decisions too can be so structured.[69]

While such a "purpose" test lacks that absolute predictability afforded by an approval of incorporation by reference or acts of independent significance, it does provide a theory which can be justified within the context of the wills statutes. It also provides a test specifically designed for the pour-over problem. Under such a test a pour-over to a charitable foundation,[70] to an irrevocable trust,[71] to a revocable, amendable trust which was never amended in terms of its dispositive aspects,[72] or to certain trusts created by third persons,[73] would be valid. Conversely, however, a pour-over

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[65] Cardozo specifically denied any general application for incorporation by reference and, by specifically hypothecating as invalid a pour-over to an oral trust, similarly denied any use of acts of independent significance. In fact Cardozo states, "Much will depend upon the extent to which the door is likely to be opened to chicanery or mistake if there is relaxation of the requirement of a self-sufficient integration." *Id.* at —, 179 N.E. at 757.

[66] 222 N.Y. 222, 118 N.E. 611 (1918), where neither incorporation by reference nor acts of independent significance were technically available. See 1 Scott, Trusts § 54.4 at 389 (2d ed. 1956).

[67] 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958), where incorporation by reference is clearly inapplicable.

[68] 260 App. Div. 174, 21 N.Y.S.2d 232 (1940), where acts of independent significance would be available under the prevailing views of Prof. Scott *et al.*

[69] Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 118 A.2d 108 (Ch. Div. 1955), where incorporation by reference was appropriate since the trust agreement was in existence; Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279 (E. & A. 1928), *affirming* 100 N.J. Eq. 196, 134 Atl. 822 (1926). See Brinckerhoff, *Incorporation by Reference and Acts of Independent Significance in New Jersey and New York*, 60 N.J.L.J. 97, 105, 113 (1937).

[70] Matter of Weber, 22 Misc. 2d 290, 195 N.Y.S.2d 337 (1959); *In re* Guggenheim's Estate, 168 Misc. 1, 5 N.Y.S.2d 137 (1938); *In re* Tiffany's Est., 157 Misc. 873, 285 N.Y. Supp. 971 (1935).

[71] Matter of Rausch, 258 N.Y. 327, 179 N.E. 755 (1932).

[72] Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279 (E. & A. 1928), *affirming* 100 N.J. Eq. 196, 134 Atl. 822 (1926); Matter of Ivie, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293; *In re* Tiffany's Est., 157 Misc. 873, 285 N.Y. Supp. 971 (1935).

[73] *E.g.*, profit-sharing trust, Estate of Furst, 27 Misc. 2d 589, 213 N.Y.S.2d 266 (1961); will of another, Matter of Fowles, 222 N.Y. 222, 118 N.E. 611 (1918); Estate of Freund, N.Y.L.J., Feb. 7, 1962, p. 12.

to a revocable, amendable trust which had been amended after execution of the will so as to affect the disposition provisions would be invalid,[74] as would a pour-over to a trust created by the testator after the execution of the will.[75] In both such cases, however, the execution of a codicil after the last dispositive amendment or after the execution of the trust, would validate the pour-over by eliminating the possibility of a violation of the purpose of the wills statutes.[76] It is interesting to note that the decisions under this test appear to presuppose that administratively the pour-over provision merely adds assets to the inter vivos trust; it does not create a separate testamentary one.[77] Such a test then would put an end to the reigning confusion on that point.

This writer believes then that to the extent the above analysis is correct, these two jurisdictions have evolved the best solution to the pour-over problem. They have eliminated the pragmatic and theoretical difficulties encountered in the application of acts of independent significance, while at the same time compensating for the inadequacies of incorporation by reference.

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[74] President & Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (1940).

[75] Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 118 A.2d 108 (Ch. Div. 1955).

[76] *Cf.* Matter of Ivie, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958); *In re* Snyder's Will, 125 N.Y.S.2d 459 (1953); *In re* Tiffany's Est., 157 Misc. 873, 285 N.Y. Supp. 971 (1935); *In re* Bremer's Will, 156 Misc. 160, 281 N.Y. Supp. 264 (1935).

[77] Matter of Rausch, 258 N.Y. 327, 179 N.E. 755 (1932); *In re* Waterbury's Trust, 35 Misc. 2d 723, 231 N.Y.S.2d 208 (1962); 1 Nossaman, Trust Administration and Taxation, § 105 at 105-6 (1st ed. 1945).